

MANDATE

12-4994-cr

United States v. Taylor

N.Y.S.D. Case #
11-cr-0310-2(PGG)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals for the Second Circuit, held
 2 at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New
 3 York, on the 21st day of October, two thousand thirteen.

4
 5 PRESENT: DEBRA ANN LIVINGSTON,
 6 GERARD E. LYNCH,
 7 CHRISTOPHER F. DRONEY,
 8 Circuit Judges.
 9 _____

10
 11 USDC SDNY
 12 DOCUMENT
 13 ELECTRONICALLY FILED
 14 DOC #: _____
 15 DATE FILED: November 14, 2013

16 UNITED STATES OF AMERICA,
 17 *Appellee,*
 18

19 JAVEL TAYLOR,
 20 *Defendant-Appellant.*
 21 _____

22
 23 No. 12-4994-cr
 24
 25 JOSHUA L. DRATEL (Lindsay A. Lewis, Whitney
 Schlimbach, of Counsel), Dratel & Mysliwiec,
 New York, NY, for Defendant-Appellant.

1 JUSTIN ANDERSON, AMY LESTER, Assistant
 2 United States Attorneys, *for* Preet Bharara,
 3 United States Attorney for the Southern
 4 District of New York, New York, NY, *for*
 5 *Appellee.*
 6

7 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**

8 **DECREEED** that the judgment entered November 30, 2012, is **AFFIRMED.**

9 Defendant-Appellant Javel Taylor ("Taylor") appeals from a judgment of the United
 10 States District Court for the Southern District of New York (*Gardephe, J.*), entered
 11 November 30, 2012. Taylor was convicted, after a jury trial, of one count of conspiracy to
 12 distribute a controlled substance, in violation of 21 U.S.C. § 846, and one count of
 13 distribution of a controlled substance, in violation of 21 U.S.C. §§ 812, 841(a)(1), (b)(1)(C),
 14 and 18 U.S.C. § 2. We assume the parties' familiarity with the facts of the case and the
 15 issues presented for appellate review.

16 Taylor raises four claims on appeal: (1) that the district court erred in denying
 17 Taylor's claim under *Batson v. Kentucky*, 476 U.S. 79 (1986); (2) that the district court's
 18 admission of certain background evidence was erroneous under Rules 404(b) and 403 of
 19 the Federal Rules of Evidence; (3) that the evidence of an unlawful agreement on the
 20 conspiracy count was insufficient; and (4) that the district court erred in instructing the jury
 21 on an aiding and abetting theory of liability when Taylor was portrayed as a principal at
 22 trial. We find all four claims to be without merit.

1 I. Batson *Claim*

2 First, Taylor cannot demonstrate that the district court erred in concluding that the
 3 Government did not violate Taylor's equal protection rights during jury selection. The trial
 4 court uses a three-step process for analyzing a claim under *Batson*:

5 First, the defendant must make a *prima facie* showing that the prosecutor has
 6 exercised peremptory challenges on the basis of race. Second, if the requisite
 7 showing has been made, the burden shifts to the prosecutor to articulate a
 8 race-neutral explanation for striking the jurors in question. Finally, the trial court
 9 must determine whether the defendant has carried his burden of proving
 10 purposeful discrimination.

11
 12 *United States v. Douglas*, 525 F.3d 225, 238 (2d Cir. 2008) (quoting *Hernandez v. New York*, 500
 13 U.S. 352, 358-59 (1991) (plurality opinion)) (internal citations omitted). Taylor argued to
 14 the district court that the Government used peremptory strikes to exclude three of four
 15 African-American jurors in the venire. The district judge expressed uncertainty about
 16 whether two of the three jurors identified by the defense were, in fact, African-American,
 17 but assuming that they were, credited the Government's race-neutral explanations for the
 18 strikes. Taylor argues that the district court erred in concluding that the Government's
 19 stated reasons for its challenges were not pretexts for racial discrimination.

20 "[T]he trial court's decision on the ultimate question of discriminatory intent
 21 represents a finding of fact of the sort accorded great deference on appeal." *Hernandez*, 500
 22 U.S. at 364. Therefore, the court's "finding as to whether the prosecutor's reason was
 23 race-neutral may be overturned only if that finding is clearly erroneous." *Douglas*, 525 F.3d

1 at 239. “Where there are two permissible views of the evidence, the factfinder’s choice
 2 between them cannot be clearly erroneous.” *United States v. English*, 629 F.3d 311, 319 (2d
 3 Cir. 2011) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)) (internal quotation
 4 marks omitted).

5 Here, the district court noted that the three jurors who had been removed by the
 6 Government “were among the most disengaged in the process,” a factor that we have
 7 previously credited as a valid race-neutral explanation. *See Messiah v. Duncan*, 435 F.3d 186,
 8 200 (2d Cir. 2006) (“A prosecutor may reasonably have qualms about a panelist who fails
 9 to pay attention during voir dire.”). The court observed specifically that one of the
 10 challenged jurors gave “monosyllabic responses” and that another appeared not to have
 11 “understood all of the questions before he answered.” *See Green v. Travis*, 414 F.3d 288, 300
 12 (2d Cir. 2005) (“[T]he unfavorable demeanor of a venireperson has been held to be a
 13 race-neutral explanation for a peremptory challenge.”). We discern no clear error in these
 14 determinations, nor can we identify error in the court’s conclusion that the government’s
 15 reasons for striking the third juror – because her employment could lead her to identify
 16 with the defendant and because she enjoyed watching CSI, a police forensic drama – were
 17 not pretextual. *See United States v. Farhane*, 634 F.3d 127, 157-58 (2d Cir. 2011) (“[I]t was
 18 plausible for the prosecutor to think that a juror who regularly watched television shows
 19 in which forensic science conclusively solved crimes might be more inclined to demand
 20 such evidence in order to convict.”). Accordingly, Taylor’s claim is without merit.

1 II. *Admission of Prior Acts as Background Evidence*

2 Taylor next argues that the district court erred in permitting an undercover officer
 3 to testify about an unconsummated drug sale several weeks before the charged conduct,
 4 in supposed violation of Rules 404(b) and 403. “We accord a district court’s evidentiary
 5 rulings deference, and reverse only for abuse of discretion.” *United States v. Cuti*, 720 F.3d
 6 453, 457 (2d Cir. 2013). “To find such abuse, we must conclude that the trial judge’s
 7 evidentiary rulings were arbitrary and irrational.” *United States v. Mercado*, 573 F.3d 138,
 8 141 (2d Cir. 2009). Here, the district court did not abuse its discretion in concluding that
 9 the testimony was admissible.

10 During the challenged testimony, the officer stated that a few weeks prior to the
 11 March 2011 transaction, he received a cell phone number for an individual known as “J”
 12 and placed an order for crack cocaine. Once the officer arrived at the location where he had
 13 arranged to meet “J,” he called the same number again and Taylor subsequently
 14 approached with “what appeared to be crack cocaine in his hand.” Once he saw the officer,
 15 however, Taylor decided not to consummate the transaction and ran into a stairwell.

16 The evidence of this prior occurrence was relevant background to the charged
 17 March 2011 transaction. “To be relevant, evidence need only tend to prove the
 18 government’s case, and evidence that adds context and dimension to the government’s
 19 proof of the charges can have that tendency.” *United States v. Williams*, 585 F.3d 703, 707
 20 (2d Cir. 2009). Background evidence is permissibly admitted “to enable the jury to

1 understand the complete story of the crimes charged." *United States v. Reifler*, 446 F.3d 65,
 2 92 (2d Cir. 2006) (internal quotation marks omitted). Here, the challenged evidence
 3 buttressed the officer's identification of Taylor at the time of the later March 2011
 4 transaction and also helped to explain why the police were interested in purchasing cocaine
 5 from "J" on March 21, 2011.

6 The district court did not err, moreover, in determining that the probative value of
 7 the undercover officer's testimony was not substantially outweighed by the danger that it
 8 would unfairly prejudice the defendant. *See United States v. Goffer*, 721 F.3d 113, 129 (2d
 9 Cir. 2013). The offered evidence was "not especially worse or more shocking than the
 10 activity charged" in the indictment. *United States v. Coppola*, 671 F.3d 220, 246 (2d Cir. 2012)
 11 (alteration and internal quotation marks omitted). And any risk of unfair prejudice was
 12 further mitigated by a limiting instruction from the district court that specifically directed
 13 the jurors that they could not convict Taylor based on any evidence of acts other than the
 14 charged March 2011 transaction. *See United States v. Abu-Jihad*, 630 F.3d 102, 133 (2d Cir.
 15 2010) (citing *Mercado*, 573 F.3d at 142). Accordingly, the trial court did not abuse its
 16 discretion in admitting the evidence of the prior attempted sale.

17 *III. Sufficiency of the Evidence*

18 Third, Taylor challenges his conspiracy conviction on Count One, claiming that there
 19 was insufficient evidence to demonstrate an unlawful agreement to distribute controlled

1 substances. We review the sufficiency of the evidence following a criminal conviction "in
2 the light most favorable to the government, crediting every inference that could have been
3 drawn in the government's favor." *United States v. Corsey*, 723 F.3d 366, 373 (2d Cir. 2013).
4 Central to a conspiracy conviction is an agreement to commit unlawful acts. *United States*
5 *v. Praddy*, 725 F.3d 147, 153 (2d Cir. 2013). "The coconspirators need not have agreed on
6 the details of the conspiracy, so long as they agreed on the essential nature of the plan."
7 *Id.* (quoting *United States v. Berger*, 224 F.3d 107, 114 (2d Cir. 2000)). The conspiratorial
8 agreement, moreover, "may be tacit rather than explicit." *United States v. Zhou*, 428 F.3d
9 361, 370 (2d Cir. 2005).

10 Citing this Court's decision in *United States v. Tyler*, 758 F.2d 66 (2d Cir. 1985), Taylor
11 argues that the evidence showed that his co-defendant, Leonard Fitzgerald ("Fitzgerald"),
12 was merely a facilitator who directed the undercover officer to buy from Taylor, and that
13 such evidence is insufficient to establish a conspiracy to distribute controlled substances.
14 In *Tyler*, however, the defendant merely introduced a buyer to a seller of narcotics, and the
15 buyer and seller separately conducted the unlawful transaction. We noted in concluding
16 that the evidence was insufficient to establish an agreement between the facilitator and the
17 ultimate seller that there was no evidence that the facilitator "asked [the buyer] how much
18 heroin he sought to purchase, that [the facilitator] indicated that he had a specific source
19 of heroin in mind for [the buyer], that [the facilitator] knew where to find [the seller] or

1 expected him to be in the area, or that [the facilitator] had made any previous deals with
 2 [the seller].” *Tyler*, 758 F.2d at 68-69.

3 That is not this case. Drawing all inferences in favor of the Government, the
 4 evidence here showed that Fitzgerald contacted Taylor in response to the undercover
 5 officer’s inquiry about purchasing crack cocaine and arranged by telephone to meet with
 6 Taylor himself. Fitzgerald took the undercover’s \$40 in marked bills and, out of the sight
 7 of the undercover officer, received the crack cocaine from Taylor.

8 Fitzgerald’s role thus was far more active: he knew the amount of crack cocaine that
 9 the undercover officer requested; he knew how to contact Taylor; and he implied to the
 10 officer that he had conducted previous deals with Taylor. Moreover, he did not introduce
 11 Taylor to the undercover officer and allow them to consummate the transaction; rather, he
 12 took the officer’s money, made the exchange himself, and delivered the drugs to the officer.

13 *See United States v. Brown*, 776 F.2d 397, 403 n.10 (2d Cir. 1985) (distinguishing *Tyler* by
 14 stating that, in the case before it, “a jury could reasonably infer prior arrangements or an
 15 established working relationship between” a steerer and a seller). Thus, the evidence
 16 presented at trial was adequate to allow the jury to conclude that Taylor and Fitzgerald had
 17 consummated an unlawful agreement to distribute controlled substances.

18

19

1 IV. *Instruction on Aiding and Abetting*

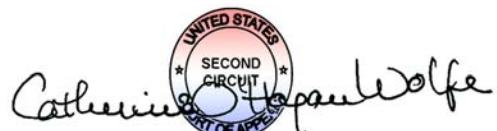
2 Finally, Taylor challenges the district court's instruction that Taylor could be
 3 convicted on Count Two, which charged him with the substantive distribution of
 4 controlled substances, as an aider and abettor of Fitzgerald's commission of the underlying
 5 crime. Taylor claims that, given the Government's presentation of evidence that Fitzgerald
 6 played the role of the "steerer" in the transaction, Taylor was the principal offender and
 7 the district court should not have charged the jury on the theory that Taylor could be guilty
 8 on Count Two as an aider and abettor.

9 "We review challenged jury instructions *de novo* but will reverse only if all of the
 10 instructions, taken as a whole, caused a defendant prejudice." *United States v. Bok*, 156 F.3d
 11 157, 160 (2d Cir. 1998). Those aiding or abetting any federal offense can be charged and
 12 convicted as principals. 18 U.S.C. § 2. Where two alternative theories of guilt are charged,
 13 the conviction will stand as long as there is sufficient evidence to support a conviction
 14 under either theory. *See United States v. Becerra*, 97 F.3d 669, 672 (2d Cir. 1996) (holding that
 15 a "conviction as an aider and abettor was not erroneous since the jury had ample evidence
 16 on which to convict [the defendant] as a principal"). Because the jury had adequate
 17 evidence on which it could have convicted Taylor either as a principal or as an aider and
 18 abettor (on the theory that Fitzgerald, who actually "distribute[d]" the drugs to the officer,
 19 21 U.S.C. § 841(a)(1), was the principal, and that Taylor either "aid[ed]" or "command[ed]"

1 that action, 18 U.S.C. § 2), there was no error and the instruction could not have caused him
2 prejudice. Accordingly, Taylor's claim of error on this ground is unavailing.

3 We have considered all of Defendant-Appellant's remaining arguments and find
4 them to be without merit. For the foregoing reasons, the judgment of the district court is
5 hereby **AFFIRMED**.

6 FOR THE COURT:
7
8 Catherine O'Hagan Wolfe, Clerk


Catherine O'Hagan Wolfe

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit


Catherine O'Hagan Wolfe